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No. 86 - 1957

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1986

MONTGOMERY PUBLISHING COMPANY,
*Petitioner*

v.

CHARLES M. GANT
*Respondent*

## ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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## COUNTER STATEMENT OF THE CASE

Respondent disagrees with the statement that the article was factually accurate in all material respects. On the contrary, the article concerned an arrest of respondent on two charges of theft by deception. However, the article went on to talk about other crimes, the inference being that said crimes involved respondent and inferred that there was a criminal relationship with respondent's cousin who was in an adjacent county prison. Said article also implied that Gant was a member of a criminal ring including his cousin. Gant said that he was not involved in any of the other crimes and never was charged in the various other crimes mentioned in the article which crimes were in the vicinity of his home. The Petitioner, Newspaper, made no effort to verify whether or not Respondent had been involved in said crimes. In one instance the owner of the store had known Charles Gant for many years and would have said it was not Charles Gant who committed this particular crime, if asked.

## RESPONDENT'S REASONS WHY THE WRIT SHOULD NOT BE GRANTED

*A. This was not a burden of proof case at this stage of the proceedings and therefore the Pennsylvania Supreme Court did not circumvent the mandate of Hepps.*

The Petitioner in its brief argued that the case of *Pennsylvania Newspapers, Inc. v. Hepps*, 106 S. Ct.

1558 (1986) circumvented by the Pennsylvania Supreme Court in it Per Curiam opinion.

The Respondent argued in its brief before the Pennsylvania Supreme Court that at this stage of the case the burden of proof was not the issue and that since this was a motion for a nonsuit which as explained by the Superior Court, in its opinion, where the article was capable of two interpretations, it should have been a matter for a jury. Respondent in its brief in summary arguments stated as follows:

> "This is a case there the article as a whole was false as to Gant and the literary accuracy of separate statements should not render the article true. See *Dunlap*. Therefore, the key to the case is not the burden of proof, and *Hepps* at this stage should not prevent a retrial."

The Respondent in his brief to the Pennsylvania Supreme Court further stated:

> "The burden of proof should not be the key issue here, since if the Court follows *Dunlap* supra than plaintiff has met his burden since the article as a whole was false to the plaintiff."

This same argument was made in the oral argument. Therefore, *Philadelphia Newspaper v. Hepps*, supra is not controlling. Obviously, if the case is tried as would now be allowed by the Pennsylvania Supreme Courts ruling, the trial Court would follow

the ruling of the this Court and put the burden of proof on Respondent.

The Superior Court in reversing the trial Court in this case held the issue was it sufficient to present a question for the jury on which a verdict for the plaintiff could have been based. Therefore, at this stage an analysis of the Superior Court's opinion will indicate that this was not a burden of proof case and that a nonsuit should not have been granted.

I note for this Court's consideration the relevant part of the Superior Court opinion on this issue Appendix A-5 and A-6.

> "We note that in reviewing the propriety of the granting of the compulsory nonsuit, we need not ultimately determine whether the publishing company was actually negligent, but need only determine whether the plaintiff/appellant's evidence was sufficient to present a question for the jury on which a verdict for the plaintiff could have been based. *Commonwealth Trust Co. v. Carnegie-Illinois Steel Co.*, 353 Pa. 150, 44 A. 2d 594 (1945) : *McNett v. Briggs*, 217 Pa. Super. 322, 272 A. 2d 202 (1970) . The foundation for this principle lies in the concept that when the trial court is presented with a choice between two reasonable inferences the case must be submitted to the jury. *Kelly v. Doran*, 312 Pa. 312 Pa. Super. 286, 458, A. 2d 962 (1983); *Paul V. Hess Bros., Inc.*, 226 Pa. Super. 92, 312 A. 2d 65 (1973).

> In making that determination, we must view the evidence in the light most favorable to the plaintiff/appellant. *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362,372 A. 2d 736 (1977); *West Penn Power Co. v. Bethlehem Steel Corp.*, 236 P. Super. 413, 348 A. 2d 144 (1975). We may affirm the trial court's entry of the compulsory nonsuit only if the case before the trial court is clear, *McKenzie v. Cost Bros., Inc.*, 487 Pa. 303, 409 A. 2d 362 (1979); *West Penn Power Co. v. Bethlehem Steel Corp.*, 236 Pa. Super. 413, 348 A. 2d 144 (1975) , if the facts and circumstances have as the only conclusion the absence of liability. *McKenzie v. Cost Bros., Inc.*, Supra, and where there is no doubt as to the inferences to be drawn form the evidence."

Therefore, the Supreme Court of Pennsylvania did not ignore the mandate of the United States Supreme Court but felt appropriately at this stage of the proceedings, the burden of proof was not the issue and the burden of proof would become relevant at the second trial of the case.

B. *It is not unconstitutional to permit Respondent to require that an article be read in its entirety and that literal accuracies of separate statements do not render a communication true where as here the implication of the communication as a whole false.*

The Respondent denies this was an accurate report as to the circumstances beyond the fact of his immediate arrest as applied to him. Pennsylvania in

the case of *Dunlap v. Philadelphia Newspapers Inc.* 301 Pa. Super. 475, 448 A. 2d 6 (1982), which was decided after the trial of this case, adopted the following rule:

> "In the absence of any Pennsylvania case, we are free to adopt and have concluded that we should adopt the approach of sister states and hold that literal accuracy of separate statements will not render a communication "true" where, as here, the implications of the communications as a whole was false." See *Sack* Supra. at 50-51, 139-40 (collecting cases). As one Court has said "it is not sufficient to take every sentence separately and demonstrate its individual accuracy detached and wrenched out of context. *Clark v. Pearson* 248 F. Supp. 188,191 (D.D.C.) 1965."

See also *Washington Post Company v. Choloner* 250 US 290 (1919).

Since there was testimony concerning other crimes, the Rule as set forth in American Jurisprudence Section 252 should be followed:

> "One is privileged to publish the actual facts as to the arrest on a charge made against a person suspected of a crime provided that the statement does not go further than to merely report the news by making charges directly or by inference, insinuation or assumption that the person arrested is guilty of a crime. To be

> privileged a news article must be accurate, at least substantially so. If the account does go beyond the mere narration of the transaction recounted and makes injurious refractions on the private business character of a party to the transaction is actionable is untrue, and privilege does not extend to conclusions of the publisher or to statements based upon his own investigation unless they are founded on true facts."

It should also be pointed out that in the Restatement of Torts Section 611 Comment H, Arrest.

> "An arrest by an officer is an official action and a report of the fact of the arrest or the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this section. On the other hand, statements made by the police or by the complainant or other witness or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or the arrest itself are not privilege under this section."

Because the facts beyond an arrest are not privileged and if they are inaccurately reported as regards to the Respondent there should be a defamation action allowed.

Petitioner in its petition suggest on Page 9 that lower Court authority generally supports a rule against defamation by innuendo when the reported facts are accurate and complete, citing cases. These cases can be distinguished because all of them involve public figures where a different standard apply. It is interesting that in *Schaefer v. Lynch*, 406 So. 2d 185, La. (1981), the Court distinguished in an earlier case of *Madison v. Bolton* 234 LA 997 102 So. 2d 433 (1858) saying:

> "It was correctly held that truthful statements which carry a defamatory meaning can be actionable. However, this is only true in the case of private citizens and private affairs."

The Petitioner's brief relies extensively on the case of *Greenbelt Cooperative Publishing Association v. Bressler* 398 US 6 (1970). This involved the word "blackmail" stated at a public council meeting. The court held that since this was a statement that was accurately reported as to what was said at the public meeting, there was no violation. It is also significant that the Court in Greenbalt said:

> "If the reports had been truncated or distorted in such a way as to extract the word 'blackmail' from the context in which it was used at the public meeting, this would be a different case. But the reports were accurate and full."

Here Respondent is claiming that the other crimes that Respondent was alleged to be involved in was station house gossip which was not checked as to Respondent and was inaccurately portrayed as to Respondent.

Petitioner in its brief says that the issue involved here affects the media's ability to report on such public matters including crime, which seems to infer that the decision of the Pennsylvania Supreme Court impermissibly intrude in the field of free speech. As previously stated based on the American Jurisprudence #522 and the Comment "H" of Restatement of Torts 622, this has not been the law and that if the press goes into detail beyond the immediate fact of the crime at hand, the press can be held responsible for false implications. Respondent has argued that the normal reading of the article would indicate that Respondent was involved in other criminal activities.

There are also other interests than the Press in reporting crime. Widespread publicity of an arrest makes it very hard in many instances to have a fair trial. It is this writers opinion that it would be a good public policy to restrict the reporting of an arrest to the fact of the arrest, the name, identity of the defendant and leave it at that. There are plenty of opportunities for the Press to cover the preliminary hearing if they wish to report on evidence presented and to cover the trial of the case or guilty pleas. Frankly, this writer feels that the English system where once the arrest is made, laws prevent any newspaper articles other than the facts of the arrest

until the trial of the case would solve many of the problems created by the releases by the police and prosecutors concerning the cases prior to trial which may cause prejudicial pretrial publicity. While such a policy, perhaps, is too much to hope for in this country, it would not be prevented by the First Amendment. It is not a violation of the Constitution to allow libel cases and this court has indicated that standards particularly as to "private persons" should be set by the states. In *Gertz v. Robert Welsh, Inc.* 418 US 323 (1974), this court said at Page 347:

> " We hold that so long as they do not impose liability without default, the state may define for themselves the appropriate standards of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognize the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation yet shields the press and broadcast media from the rigors of strict liability of defamation."

Therefore, the decisions of the Pennsylvania Appellate Courts concerning this private individual should be allowed to stand and Respondent allowed his trial before a jury. It may or may not decide in his favor.

## CONCLUSION

For the foregoing reasons the Petition for Certiorari to the Supreme Court of Pennsylvania should not be granted.

Dated: June 24, 1987

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